PERTUBOHAN BERITA NASIONAL MALAYSIA

v.

STEPHEN KALONG NINGKAN

FEDERAL COURT, KUCHING
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN FJ
TAN CHIAW THONG J
[CIVIL APPEAL NO. 224 OF 1980]
12 MAY 1981

CIVIL PROCEDURE: *Court order imposing time limit for compliance with order for particulars - Whether service of particulars within time - Whether proper construction given to O. 64 r. 12 of Rules of Supreme Court 1957 - Service of particulars out of time - Effect on statement of claim of non-compliance with Court order imposing time limit - Whether an irregularity - Whether O. 70, r. 1, applicable - Acceptance of late service without protest - Whether waiver.*

The appeal was against the refusal by the lower Court of an application by the appellant for an order striking out the particulars served by the respondent upon the appellant on the ground that they were served in breach of an order of the lower Court after the time limit imposed by the said order had expired.

The action in the lower Court concerned a claim brought by the respondent against the appellant for damages and an injunction in relation to an alleged libel. By a summons in chambers the defendant (appellant) applied for an order, *inter alia*, that the plaintiff (respondent) do serve on the defendant within 14 days particulars in writing relating to paragraphs 6 and 7 of the statement of claim. The appellant also asked that in default of compliance with the order sought, paragraph 7 of the statement of claim be struck out without further order.

On 9 November 1979, an order was made by the lower Court in terms, *inter alia*, of the application as set out. The order was served by the appellant on 23 November 1979 upon the respondent, who served the relevant particulars upon the appellant on 24 November 1979.

The appellant then applied for a summons in chambers for the striking out of the particulars on the ground of time that they were served out of time. The application was refused under O. 64 r. 12 of the now repealed Rules of the Supreme Court, 1957, as applied to Sarawak by the Rules of the High Court in Borneo, (1963).

Held:

[1] The Judge misconstrued the effect of O. 64 r. 12 in finding that the respondent had served within time. Service of the particulars ought to have been made by 23 November 1979.

[2] The respondent, having served the particulars on 24 November 1979, and outside the time limit imposed by the lower Court order, had been clearly in default. Paragraph 7 of the statement of claim thereby became automatically struck out by the said order. [*Reiss v. Woolf* [1952] 2 ALL ER 112]

[3] No question arose of whether the Judge had exercised his discretion by refusing the appellant's application, as the Judge had not dealt with the application on the footing that what had happened was an irregularity within the meaning of O. 70 r. 1. He had simply held that no default had been committed by the respondent against the order of the lower Court.

[4] The acceptance by the appellant of late service without protest did not constitute waiver of irregularity, if irregularity it be. The appellant was not competent to waive compliance with the limit imposed by the Court. The proper means to excuse non-compliance of a Court order is by way of a further court order. *Sheldon v. Brown Bayley's Steelworks Ltd. & Anor*. [1953] 2 ALL ER 894; and *Re Chittenden (deceased Chittenden v. Doe & Anor*. [1970] 3 All ER 562 distinguished.

[Appeal allowed.]

Cases referred to:
Reiss v. Woolf [1952] 2 All ER 112
Sheldon Brown Bayleys Steelworks Ltd & Anor [1953] 2 All ER 894
Re Chittenden(deceased) Chittenden v. Doe & Anor [1970] 3 All ER 562

Legislation referred to:
Rules of Supreme Court 1957, O. 64 r. 12, O. 70 r. 1

For the appellant - John Ko
For the respondent - T.O. Thomas

JUDGMENT

Tan Chiaw Thong J:

We allowed the appeal and stated that we would give our reasons later. We do so now.

This is an appeal against the refusal by the lower Court of an application made by the appellant (defendant in the lower Court) for an order striking out the particulars served by the respondent upon the appellant on 24 November 1979, on the ground that such particulars were served in breach of an order of the lower Court dated 9 November 1979, after the time limit imposed by the said order had expired.

The action in the lower Court concerns a claim brought by the respondent against the appellant for damages and an injunction in relation to an alleged libel. The relevant parts of paras. 6 and 7 of the statement of claim reads:

> 6. And on or about 18 April 1971 the defendant falsely, maliciously and recklessly wrote and published and/or caused to be written and published of and concerning the plaintiff and of and concerning him in the way of his said office as chairman of the Sarawak National Party a news message alleging, *inter alia*, that the chairman of the Sarawak National Party Dato Stephen Kalong Ningkan told the High Court at Sibu on 18 April 1972 that his party had received a donation of RM145,000 from Kong Thai Sawmill (Miri) Sdn. Bhd. ...
>
> 7. The defendant wrote and published the said news message to various persons in Malaysia and Singapore and same was printed and published in several newspapers circulating in Malaysia and Singapore.

By a summons in chambers dated 27 March 1979, the appellant applied for an order, *inter alia*, that the plaintiff do serve on the defendant within fourteen (14) days particulars in writing relating to paragraph 7 of the statement of claim and identifying the person or persons to whom the respondent alleged the appellant had published the news message mentioned in para. 6 of the statement of claim; and naming and identifying the several newspapers who the respondent alleged printed and published the said news message. The appellant also asked that in default of compliance with the order sought para. 7 of the statement of claim be struck out without further order.

The appellant's summons in chambers was heard on 9 November 1979, when an order was made by the lower Court in terms, *inter alia*, of the application as set out above. The order was approved and extracted on 23 November, 1979 and was, on the same day, served at 3.05 p.m. upon the respondent's advocates, who served the relevant particulars upon the appellant's advocates at 9.50 a.m. the following day 24 November 1979. Mr. John Ko, learned counsel for the appellant, then affirmed an affidavit on 27 November 1979, in support of a summons in chambers dated 24 December 1979, applying for the striking out of the particulars so served on the ground mentioned at the beginning of this judgment.

The appellant's summons in chambers was heard by the learned Judge on 25 January 1980. His decision, made on the same day, was as follows: "Application refused. See O. 64 r. 12. Cost(s) to the respondent." The learned Judge subsequently certified that he required no further argument in open Court.

In substance, the appeal is confined to three grounds, as set out in paras. 2, 3 and 5 of the memorandum of appeal. They read as follows:

> 2. The learned Judge had wrongly misconstrued the effect of O. 64 r. 12 of the Rules of the High Court in Borneo (1963) in finding that the plaintiff had served the particulars within the fourteen days as stipulated by the order of the Court dated 9 November 1979 when in fact the particulars should have been served on 23 November 1979 being the last day for effecting service under the aforesaid order.
>
> 3. The learned Judge had erred in not striking out the plaintiff's particulars because the plaintiff had served on 24 November 1979 particulars of para. 7 of the statement of claim which is no longer on record as it had been struck out without further order by para. 2 of the said order dated 9 November 1979 after 23 November 1979.
>
> 5. In the premises the learned Judge had failed to exercise his discretion and/or has exercised the same on the wrong principles when disallowing the defendant's application to strike out the plaintiff's particulars.

It should be noted that the relevant rules of procedure applicable to the proceedings before the lower Court are the now repealed Rules of the Supreme Court, 1957, as applied to Sarawak by the Rules of the High Court in Borneo, 1963, (GN. S209.63).

It seems clear that the learned Judge, by his decision, took the view that the particulars were not served out of time. This is apparent by his reference solely to O. 64 r. 12. That rule reads:

> In any case in which any particular number of days, not expressed to be clear days, is prescribed by these rules, the same shall be reckoned exclusively of the first day and inclusively of the last day.

It is common ground that the time limit imposed by the Court Order of 9 November 1979, falls to be construed under this Rule. In any event, delay in serving the particulars ordered was admitted in the lower Court by learned counsel for the respondent.

In essence, the question for determination is whether the learned Judge was correct in deciding that, in terms of O. 64 r. 12, the particulars ordered were not served out of time. In this connection, the order of the lower Court was made on 9 November 1979, and it ordered, *inter alia*, that (a) the particulars sought by the appellants be served on them by the respondent within fourteen days; and (b) in default of compliance para. 7 of the statement of claim be struck out without further order. As to (a), by simple arithmetic, it is clear that,

under O. 64, r. 12 by excluding the day that order of the lower Court was made, and including the last day limited by the said order, the respondent had until 23 November 1979, to serve the particulars ordered upon the appellant. This he did not do until one day later, on 24 November 1979. Hence, he was out of time, and his learned Counsel had not sought to contend otherwise. Indeed, as already observed he admitted delay in the proceedings before the lower Court. Hence, it seems clear that the learned Judge was wrong in refusing the appellant's application on the sole ground that the particulars had not been served out of time, which in effect, meant that the respondent had not made default in compliance with the order of the Court. What follows from this conclusion is related to para. 2 of the order which clearly and specifically states that in default of compliance para. 7 of the statement of claim be struck out without further order." The relevant part of the head-notes in *Reiss v. Woolf* [1952] 2 ALL ER 112 reads:

> On 8 February 1952, a plaintiff obtained an order of a master that the defendant deliver 'not later than four o'clock in the afternoon of the twenty-first day following the date hereof... the undermentioned further and better particulars of his defence and that in default thereof paras. 2 and 3 of the defence be struck out.' Within the time limited the defendant delivered particulars which represented an attempt to comply with the order, but were not a full compliance, the defendant replying in respect of several matters that he could not give particulars until after discovery. On a summons to have the action transferred to the short cause list on the ground that paras. 2 and 3 of the defence had been automatically struck out.
>
> **Held:** an order imposing conditionally a penalty, such as the striking out of a defence, must be precise in its terms or it will be inoperative: *Abalian v. Innous* ([1936] 2 ALL ER 834) applied: on construction, 'default' in the order meant, not default in the sufficiency of one or more of the answers, but default in delivery within the prescribed time of a document made in good faith which could fairly be entitled 'particulars'.

In the course of his judgment with which the other two learned Lord Justices concurred, Somervell LJ stated (at p. 113-4):

> The order can conform with the principle in that case only if it is treated as an order that is dealing with the time of compliance rather than with the mode of compliance. The order does fix a time very precisely, and I think it can and should fairly be construed as a time order. So construed, `default' refers to default in the delivery of a document within the specified time. I do not, of course, mean that any document with writing on it will do. It must be a document made in good faith which can fairly be entitled `Particulars'. It must not be illusory.
>
> The learned Judge also went on to deal with the question whether under an order of this kind the paragraphs are struck out automatically or whether there has to be a fresh application. On that matter he accepted the contention for the plaintiff that if there was a default the order operated automatically. So far, at any rate, as a complete failure to comply is concerned, I would agree with that - that is to say, if no document which could possibly be described as particulars was delivered, but if a document were delivered regarding which the question arose whether it was illusory, I think it might be the subject of a further application.

The order of the lower Court was precise in its terms: it enjoined the respondent to serve upon the appellants the particulars ordered within fourteen days from the day the order was made, in default of which para. 7 of the statement of claim shall automatically be struck out without further order. The particulars having been served outside the time limit imposed by the lower Court order, there has clearly been a default by the respondent; and the conclusion is, in the circumstances, inescapable that para. 7 of the statement of claim became automatically struck out without further order. The above dispose of ground 2 and 3 of the appeal.

In his written submission the learned Counsel for the respondent submitted that what had occurred was an irregularity within the meaning of O. 70 r. 1 of the 1957 Rules and that the learned Judge had a discretion as to what order to make and, having apparently accepted the respondent's contention that the delay was an irregularity, had exercised his discretion by refusing the appellant's application. On the other hand, learned counsel for the appellants, with regard to ground 5 in the memorandum of appeal argued that his decision shows that the learned Judge had not exercised his discretion and it falls upon this Court to decide the matter on the merits of the appellant's application. With respect, it must be clear from what has been stated in relation to the sole ground on which the learned Judge based his decision, that the learned Judge did not deal with the application on the footing that what had occurred was an irregularity within the meaning of O. 70 r. 1: he had simply held that, in serving the particulars ordered on 24 November 1979, no default had been committed by the respondent against the order of the lower Court. Hence, no question of whether the learned Judge had exercised his discretion arises. The Supplementary Appeal Record shows that, by Summons in Chambers dated 12 August 1980, an application was made by the respondent to the lower Court, before another Judge, for the time for service upon the appellant of the particulars ordered to be extended by one day. The hearing of this application was adjourned because of this appeal. In the circumstances, it would not be proper for this Court to deal with this appeal in the way suggested by learned counsel for the appellant.

Learned counsel for the respondent has also made the point that, by accepting late service without protest, the advocates for the appellant gave the impression to the advocates for the respondent that everything was in order until the service upon the latter of the appellant's summons in chambers on 2 January 1980; and in the circumstances, the appellant must be taken to have waived the irregularity of late service. In this connection, it should be observed that the time limit for service was fixed by a Court order, and it seems hardly competent for the appellant to waive compliance with a Court order: the proper means to excuse non-compliance is by way of a further Court order. This order the respondent sought - but not until months later, in August 1979. He could have made his application for such an order before the hearing of the appellant's summons in chambers, but he did not do so. When queried as to the delay, learned counsel for the respondent stated that it was a mistake for the respondent not to have applied for the extension earlier - a hardly - convincing reply!

Learned counsel for the respondent has cited two cases in support of his contention on waiver of irregularity: *Sheldon v. Brown Bayley's Steel Works Ltd. & Anor*. [1953] 2 All ER 894; and *Re Chittenden (deceased) Chittenden v. Doe & Anor*. [1970] 3 All ER 562. However, an examination of these authorities does not appear to bear out this contention. The headnote in the *Sheldon's* case reads:

> A plaintiff in an action under the Fatal Accidents Act 1846, issued a writ within twelve months of the death as required by s. 3 of that Act, but only effected service of it more than twelve months after its date, when, by virtue of RSC., O. 8., r.1, it had ceased to be in force. The defendants entered an unconditional appearance to the writ, and later applied to have the service set aside on the ground that the writ had become a nullity.
>
> **Held:** failure to serve the writ within the prescribed time did not render it a nullity, but was an irregularity which had been waived by the defendants' unconditional appearance, and, therefore, service of the writ would not be set aside.

Part of the decision in the *Chittenden's* case, as shown in the headnote to that case, reads:

> **Held:** (iii) Although failure to serve an originating summons within 12 months was itself an irregularity (RSC O. 2 r. 1(1), application could not, by reason of O. 2 r. 2(1), be made to set aside the irregularity where a fresh step in the proceedings e.g. entry of unconditional appearance, had been taken after knowledge of the irregularity.

In both cases, the fresh step mentioned consisted of an unconditional appearance by the defendant. That is not the case here. Further, acceptance of service of particulars ordered by the lower Court made in breach of the order of the lower Court can hardly be said, in the circumstances, to have been a step taken by the appellants in the proceedings, or to constitute a waiver of irregularity if irregularity it be.

For the reasons given the appeal is allowed with costs and the deposit is to be refunded to appellant. And order is made in terms as prayed for in the appellant's summons in chambers in the lower Court.

Also found at [1982] CLJ 471